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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. [redacted]170

FIDELITY AND GUARANTY COMPANY,

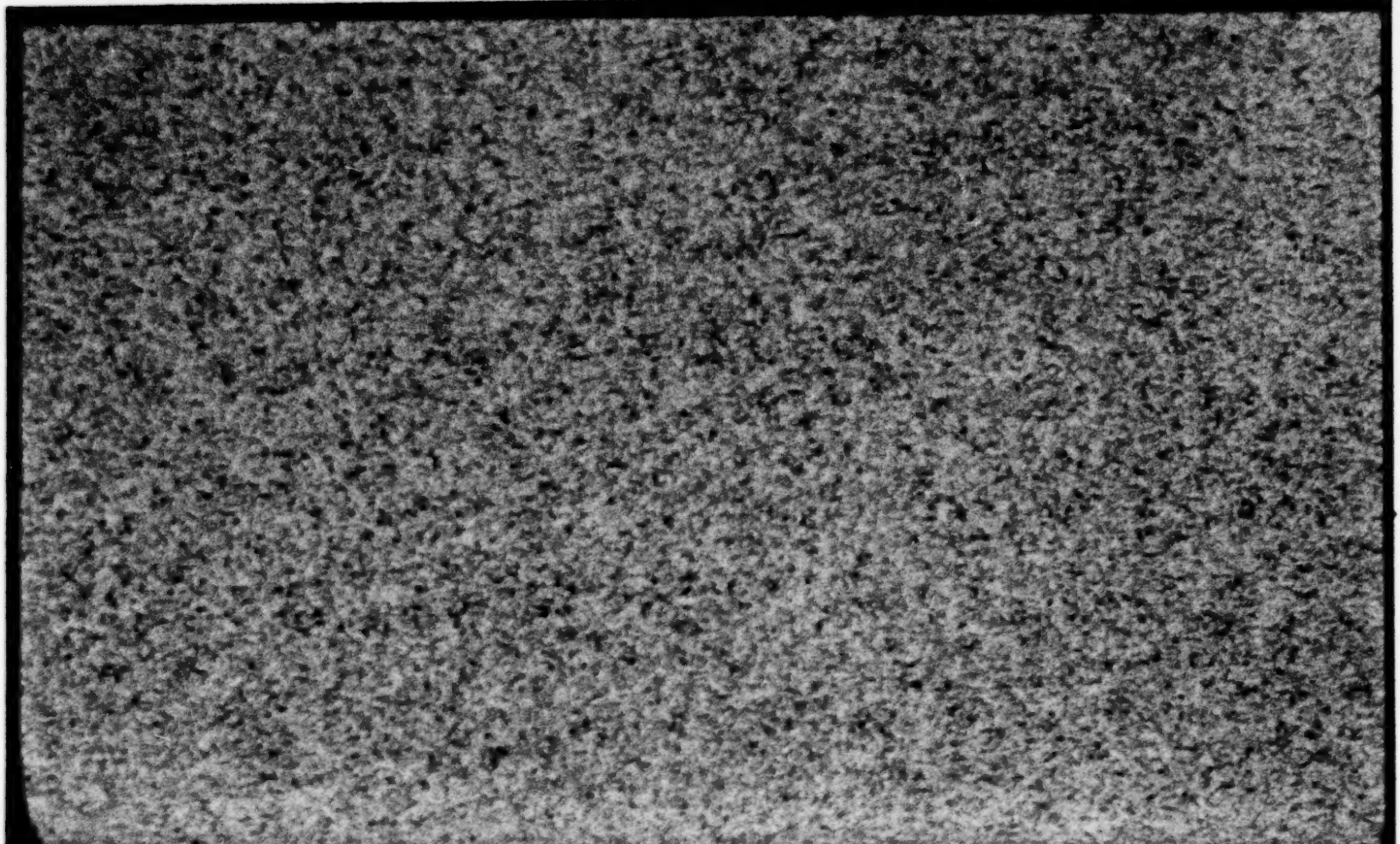
Petitioner,

vs.

HENRY W. OPPENHEIMER, Trustee in Bankruptcy of [redacted] W. A. Ide, Trustee in Bankruptcy of National Mining Corporation, Bankrupt, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

E. M. FRAZIER,
Counsel for Petitioner.



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No.

FINANCE AND GUARANTY COMPANY,
PETITIONER,

vs.

HENRY W. OPPENHIMER, TRUSTEE IN BANKRUPTCY FOR W. A. LEE, TRADING AS NATIONAL MOTOR COMPANY, BANKRUPT, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

The petition of Finance and Guaranty Company, a corporation duly organized and existing under the laws of the State of Delaware, petitioner, respectfully represents:

This action was brought in the District Court of the United States for the Eastern District of Virginia, at Richmond, Va., by the respondent, Henry W. Oppenhimer, trustee in bankruptcy for W. A. Lee, trading as National Motor Company, bankrupt, against the petitioner, Finance and Guaranty Company, for the recovery of four certain automobiles of which the petitioner had repossessed itself under the terms of certain conditional sales contracts by the institution of an action at law in the State court on the 10th day of January, 1922, on the ground that such repossession of said automobiles by the petitioner constituted a voidable preference as against said trustee in bankruptcy because such automobiles, under the provisions of Section 5224 of the Code of Virginia, known as the "Traders' Act," were made liable for the debts of the bankrupt.

Upon a trial had in the district court, a jury having been waived under proper stipulations of counsel, the district court held that the trustee in bankruptcy was not entitled to recover under the said "Traders' Act" (Rec., p. 13), to which judgment of the district court a writ of error was sued out by the trustee in bankruptcy to the Circuit Court of Appeals for the Fourth Circuit, the said circuit court of appeals reversing the judgment of the district court and holding that the trustee in bankruptcy, by reason of the "Traders' Act," was entitled to recover of the petitioner the said automobiles (Rec., p. 22; see 5 Fed., 2d, p. 486). The said circuit court of appeals then remanded the case to the district court for a new trial and the district court, on the

14th day of January, 1926, feeling itself bound by the opinion and judgment of the Circuit Court of Appeals for the Fourth Circuit, entered judgment against the petitioner for the sum of $4,190.99, with interest thereon from December 15, 1922, until paid (Rec., p. 37), being the value fixed by the court of the four automobiles which are the subject of this action, to which judgment of the court upon said second trial of this action the petitioner sued out a writ of error to the United States Circuit Court of Appeals for the Fourth Circuit, which said circuit court of appeals did, by its judgment entered on the 1st day of November, 1926, affirm the judgment of the district court and adhered to its former decision on the ground that it was bound by its former ruling, being the "law of the case" (Rec., p. 61), all of which is made more fully to appear by a certified transcript of the record in the said Circuit Court of Appeals for the Fourth Circuit which is hereto attached and prayed to be taken and read as a part of this petition.

To clarify the grounds upon which this petition for a writ of certiorari is based, a condensed statement of facts is respectfully submitted:

The petitioner was the holder of duly recorded conditional sales contracts covering four automobiles which were delivered to the possession of W. A. Lee, a resident of the city of Richmond, Va., who was doing business therein. On the 10th day of January, 1922, by an action in a State court of competent jurisdiction, the petitioner repossessed itself of said automobiles and was in possession thereof for ten days prior to

the filing of the petition in bankruptcy, in which bankruptcy proceedings the respondent was appointed trustee of the estate of the bankrupt. As far as the record discloses, at the time of the repossession of said automobiles by the petitioner there were no existing liens against the property in the possession of Lee.

The United States Circuit Court of Appeals for the Fourth Circuit held that the trustee in bankruptcy, whose status is fixed as a lienor under Section 47 A of the Bankrupt Act of 1910, was entitled to recover of the petitioner the automobiles so repossessed by it, such repossession by it constituting a voidable preference, because by the provisions of Section 5224 of the Code of Virginia, commonly called the "Traders' Act," the said automobiles were liable for the debts of Lee, the bankrupt.

The provisions of Section 5224 of the Code of Virginia, commonly called the "Traders' Act," are as follows:

> "If factor, agent, etc., who is a trader, fail to disclose name of principal or partner, or do business in his own name, property used in such business liable for his debts; exception. If any person transact business as a trader, with the addition of the words 'factor,' 'agent,' 'and company,' or 'and Co.,' and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house wherein such business is transacted, and also by a notice published for two weeks in a newspaper (if any) printed in the city, town or county wherein the same is transacted; or if any person transact such business in his own name,

> without any such addition; all the property, stock, and choses in action acquired or used in such business shall, as to the creditors of any such person, be liable for the debts of such person. This section shall not apply to a person transacting such business under a license to him as an auctioneer or commission merchant."

The petitioner most respectfully represents that the United States Circuit Court of Appeals for the Fourth Circuit failed—

1st. To follow or to give force or effect to the rulings and decisions of this Honorable Court upon the legal propositions involved; and

2d. To give force and effect to the rulings and decisions of the Supreme Court of Appeals of Virginia, that being the highest court of the State of Virginia, construing Section 5224 of the Code of Virginia, commonly called the "Traders' Act."

It has been recently held in the case of Capitol Motor Company vs. Lasker, 136 Va., 630, reaffirming the rulings and decisions theretofore had, that "creditors," within the purview of the "Traders' Act," means "lien creditors"—that is, persons who have liens upon the property.

Under the decision of this Honorable Court in the case of Bailey vs. Baker Ice Machine Co., 239 U. S., 268, 276; 36 Sup. Ct., 50; 60 L. Ed., 275, the status, as a lienor, of a trustee in bankruptcy under Section 47-A of the Bankrupt Act of 1910 is fixed as of the date of the filing of the petition in bankruptcy.

It is, therefore, at once apparent that the rights of the trustee in bankruptcy, being fixed as a lienor as of the date of the filing of the petition in bankruptcy, cannot relate back prior to the time of the filing of the petition so as to permit unsecured or non lien creditors to defeat the rights of a conditional sales vendor whose lien had been perfected as required by law long prior to the bankruptcy proceeding, and that the Honorable Circuit Court of Appeals for the Fourth Circuit failed to follow the decision of this Honorable Court, binding upon it in this behalf.

3d. The ruling and judgment of the Circuit Court of Appeals for the Fourth Circuit, being the law of the fourth circuit, creates a conflict of decision in the several circuits of the United States in the construction of Section 47-A of the Bankrupt Act of 1910, since, if the ruling of the Circuit Court of Appeals for the Fourth Circuit is permitted to stand the rule of this Honorable Court in the case of Bailey *vs.* Baker Ice Machine Co., *supra*, would not apply in the fourth circuit, whereas it does apply to the several other circuits of the United States.

The legal propositions involved in this petition are of great importance to the general public and the parties.

The petitioner respectfully presents herewith, as part of this petition, a certified transcript of the record in the said circuit court of appeals, and further presents herewith a brief in support of its petition which deals more fully with the questions involved herein.

The petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fourth Circuit, commanding said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said circuit court of appeals in this case, to the end that said case may be reviewed and determined by this Court as provided by law, and that your petitioner may have such and further relief or remedy in the premises as to this Court may seem appropriate, and that the said judgment of the said circuit court of appeals may be reversed by this Honorable Court.

FINANCE AND GUARANTY COMPANY,
By S. M. BRANDT,
Its Attorney.

UNITED STATES OF AMERICA,
State of Virginia,
City of Norfolk, To wit:

S. M. Brandt, being duly sworn, says that he is counsel for Finance and Guaranty Company, the petitioner; that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

S. M. BRANDT.

Subscribed and sworn to before me this 3d day of January, A. D. 1927.

My commission expires August 3, 1929.

[SEAL.] SELMA MORRIS,
Notary Public for the City of Norfolk, Virginia.

Certificate of Counsel.

I, S. M. Brandt, of the city of Norfolk, State of Virginia, an attorney regularly admitted to the practice in the Supreme Court of the United States of America and the attorney for the petitioner herein, do hereby certify that in my opinion the foregoing petition is well founded in matters of law; that in my opinion the case is one in which the prayer of the petitioner should be granted by this Court.

Dated Norfolk, Va., January 3, 1927.

S. M. BRANDT.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

FINANCE AND GUARANTY COMPANY,
PETITIONER,

vs.

HENRY W. OPPENHIMER, TRUSTEE IN BANKRUPTCY FOR W. A. LEE, TRADING AS NATIONAL MOTOR COMPANY, BANKRUPT, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Statement.

Three grounds of error on the part of the Honorable Circuit Court of Appeals for the Fourth Circuit are respectfully submitted as ground for the allowance of a writ of certiorari.

1. That said circuit court of appeals failed to give force and effect to the ruling of the Supreme Court of the United States in Bailey *vs.* Baker Ice Machine Com-

pany, 239 U. S., 268, in which the rule is laid down that the status, as a lienor, of a trustee in bankruptcy, under Section 47 A of the Bankrupt Act of 1910, is fixed as of the date of the filing of the petition in bankruptcy, the circuit court of appeals having held that by reason of the application of the Virginia statute—Section 5224 of the Code of Virginia, known as the "Traders' Act"—that the rights of the trustee in bankruptcy were fixed at a time anterior to the filing of the petition in bankruptcy, in that the property which is the subject of this litigation, having been in the possession of the bankrupt without compliance by the bankrupt with the terms of said "Traders' Act," that said property was liable for the debts of the bankrupt, though its status was changed by the repossession thereof by your petitioner ten days prior to the filing of the bankruptcy petition.

2. That the said circuit court of appeals failed to give force and effect to the decisions of the Supreme Court of Appeals of Virginia construing said "Traders' Act," the latter court being the highest court of the State of Virginia.

The rule in Virginia, as laid down in Capitol Motor Company vs. Lasker, 138 Va., 630, reaffirming a long line of decisions construing said act, is that the word "creditors," as employed in said act, means "lien creditors"—that is, persons who have liens upon the property. Had the honorable circuit court of appeals applied the same construction to the statute, Section 5224 of the Code of Virginia, known as the "Traders'

Act," as the Supreme Court of Appeals of Virginia, based upon the facts as disclosed by the record, then the rights of your petitioner would have been protected and its property would have been restored to or rather retained by it.

3. The ruling and judgment of the Circuit Court of Appeals for the Fourth Circuit of necessity fixes the rights of the trustee in bankruptcy as a lienor, NOT AS OF THE TIME OF THE FILING OF THE BANKRUPTCY PETITION, but as of the time when the property was held by the bankrupt under conditions making it subject to the Virginia Traders' Act, though its status was changed prior to the filing of the petition in bankruptcy so as to make it not subject to Virginia Traders' Act, is in effect a ruling that the rights of the trustee in bankruptcy are fixed as of a time anterior to the filing of a petition in bankruptcy, and therefore fails to follow the rule laid down by the Supreme Court of the United States in Bailey *vs.* Baker Ice Machine Company, *supra*, and creates a conflict of decision in the several circuits of the United States, construing Section 47-A of the Bankrupt Act of 1910, if permitted to stand.

Facts.

In order to clarify the petitioner's position brief reference is respectfully made to the facts as disclosed by the record:

On the 28th day of April, 1921, and on the 6th day of August, 1921, respectively, the petitioner contracted by

conditional sales agreement to sell to the National Motor Company (W. A. Lee, trading under this name) four certain Velie automobiles, described in said contracts, which said contracts were duly docketed, in accordance with the statute in such case made and provided, on the 18th day of May, 1921, and on September 10, 1921, respectively, in the office of the clerk of the Chancery Court of the City of Richmond, this docketing being in strict accordance with the statute in such case made and provided. The contracts in all other respects conform to the provisions of the statute, title to the automobiles which are the subject thereof being reserved in the petitioner until said automobiles were fully paid for as provided by said contracts; nothing was paid upon the contract price of this property, and on the 10th day of January, 1922, in a suit instituted in the Court of Law and Equity of the City of Richmond for the recovery of these automobiles an order of seizure was issued and the property seized and delivered to the possession of the petitioner; that from the 26th day of December, 1921, until the 10th day of January, 1922, a period of 15 days, the place wherein the business of Lee, trading as the National Motor Company, was conducted was closed, and during said period he had ceased to conduct business. On the 20th day of January, 1922, a petition in involuntary bankruptcy was filed against Lee and he was finally adjudicated a bankrupt upon an order of publication entered in said proceeding because no service of process could be had upon Lee. On January 4, 1923, a year after the seizure of said automobiles and return thereof

to the petitioner, said seizure being had pursuant to the conditional sales contracts reserving title in the petitioner, this action was instituted by the trustee in bankruptcy against this petitioner to recover possession of said automobiles. The title to this property was at all times in the defendant, and no property in said automobiles was ever acquired by the bankrupt. The conditional sales contracts prohibited either the sale or use of these automobiles by Lee; the petitioner was constantly vigilant that the terms of the contract should be complied with. From the very day of the delivery of these automobiles to the possession of Lee under said conditional sales contracts the petitioner was constantly alert to see that they did not leave Lee's possession, having time and again visited Lee's store room for the purpose of "checking" these cars.

Legal Propositions Involved.

The Circuit Court of Appeals for the Fourth Circuit, in its opinion rendered on the 1st day of November, 1926 (Rec., p. 23), makes the rights of the trustee "depend upon the so called 'Trader's Act' of Virginia—Section 5224 of the Code of Virginia"—and proceeds on the theory that the Virginia decisions hold that where goods or property of another are put into the possession of a trader, so as to form a part of his ordinary stock of merchandise, they become liable for his debts; that having once been in the possession of the trader they remain liable for such debts though repossessed by the true owner thereof, if such reposses-

sion is had within four months prior to the filing of a bankruptcy petition against the trader then such repossession constitutes a voidable preference as against a trustee in bankruptcy. The court further holds that a trustee under a deed of assignment is not, under the law of Virginia, a lienor in the same sense and with powers of a trustee in bankruptcy.

The Supreme Court of Appeals of Virginia, in Capitol Motor Company *vs.* Lasker, 138 Va., p. 630, reaffirming a long line of decisions, held:

a. That under the Virginia law a trustee under a deed of assignment, upon the recordation of the deed, becomes a lienor.

b. That the word "creditors" as employed in the Virginia Traders' Act (Virginia Code, Section 5224) means "Lien Creditors."

c. That property in the possession of a trader as a part of his general stock of merchandise, while so possessed, is subject to the provisions of the "Traders' Act," but when repossessed by the true owner thereof before any lien has attached thereto is no longer subject to the provisions of said "Traders' Act."

That such is the true construction of said Section 5224 of the Code of Virginia—"Traders' Act"—is amply supported by the language of the Supreme Court of Appeals of Virginia in the case of Capitol Motor Company *vs.* Lasker, *supra*, cited by the Circuit Court of Appeals for the Fourth Circuit in support of its ruling, to which language we most respectfully direct the attention of the Court.

At page 637 of volume 138, Virginia Reporter, it is said:

> "The main questions involved may be stated thus: (1) Were the eight automobiles or any of them, liable to the creditors of the defendant under Section 5224 of the Code, known as the Traders' Act; and (2) did White, the assignee, have the right to recover the eight automobiles, or any of them, for the benefit of the creditors of the defendant?
>
> "So much of Section 5224, Code of 1919, as is applicable, is as follows: 'If any person transact such business in his own name * * * all the property, stock and choses in action acquired or used in such business shall, as to the creditors of any such person, be liable for the debts of such persons.'
>
> "It is earnestly contended by counsel for the defendant that in construing this statute the question of the true ownership of the property is not involved, that the only question for determination is whether the stock or property was acquired or used in such business. Citing Hoge *vs.* Turner, 96 Va., 624. That the lien which the plaintiff seeks to assert is a secret lien and is in fraud of the rights of the general creditors.
>
> "Judge Riely, in delivering the opinion of the court in Hoge *vs.* Turner, *supra*, said: 'The purpose of the legislature in enacting the statute, as the title of the original act passed March 28, 1839, shows, was to prevent persons carrying on business under false or fictitious names and firms. To prevent fraud,' etc.
>
> "Numerous cases have been cited dealing with this statute. Edmunds *vs.* Hoffie Piano

Co., 97 Va., 588; Partlow *vs.* Lickliter, 100 Va., 63; Virginia Book Co., Inc., *vs.* Site, 254 Fed., 46; Boice *vs.* Finance and Guaranty Corporation, 127 Va., 563.

"In all of these cases the question presented was either a contest between the trader and creditors, between judgment creditors and lienor, or between an innocent purchaser for value and lienor or seller. The instant case is different. Here there is no contention that the dealer is trying to perpetrate a fraud on its creditors. On the contrary, the dealer, or to be more exact, its assignee, is extremely virtuous and is seeking to prevent one of its creditors from perpetrating a fraud upon all of its other creditors. If the act of the plaintiff is fraudulent, it was rendered so by the acquiescence of the defendant. We do not think the action of the plaintiff was in any respect fraudulent. It had a right to enter into the transaction, taking as it did the risk of having the automobiles subjected to the debts of defendant before it could enforce its trust lien. So as between plaintiff and defendant the recordation of the trust agreement was an immaterial matter. But as between plaintiff and the other creditors of defendant a different situation is presented.

"Until the institution of the action of detinue and the execution and recordation of the deed of assignment, we have no difficulty in holding that the eight automobiles constituted in part the apparent assets of the defendant dealer, and could be subjected to satisfy the claims of creditors, that is, lien creditors.

"(1) In answering question number one, we are of the opinion that a proper construction

of the 'Traders' Act' (Sec. 5224) is that the act is applicable only to property, stocks, etc., used in the business of the trader, *i. e.*, property, stocks, etc., which constitutes, in whole or in part, the apparent assets of the business of the trader, at the time in question; and that the creditors who are entitled to claim the benefit of such act are lien creditors only, or some representative of theirs, such as their trustee, and that whether the lien be obtained by deed of trust, execution, or otherwise, is immaterial.

"(2) In answering question number two, we are further of the opinion that White, trustee, was the proper one to intervene in the detinue action; that as trustee under the deed of assignment, he was the representative of the creditors of defendant, who immediately upon the recordation of the deed of assignment became lien creditors."

And again, at page 641:

"Upon applying the construction of the Traders' Act as stated, *supra*, to the instant case, we find the following to be the situation:

"On November 4, 1921, plaintiff by its action of detinue instituted, and its bond given that day, and the possession taken that day by the sheriff under the bond, repossessed itself of six of the automobiles on that day; so that after November 4th, those six automobiles were no longer a part of the apparent assets of the business of the trader, the defendant. That is to say, after that date the Traders' Act was no longer applicable to those six automobiles.

> "The deed of trust to White, trustee, executed on November 7, could not and did not convey any rights under the Traders' Act to White, trustee, or to any creditors, as to the six automobiles. But as to the other two automobiles, plaintiff did not obtain possession of them until November 10, 1921. They, until that date, continued to be part of the apparent assets of said trader, the defendant. They, therefore, as property to which the Traders' Act was applicable, passed to the trustee, by virtue of the deed of trust executed on November 7, 1921, which gave to the creditors, secured in that deed, or the trustee as assignee for their benefit, the right to claim the benefit of the act as to the two automobiles and to recover the same."

The property, which is the subject of this litigation, was repossessed by the true owner ten days prior to the filing of the bankruptcy petition.

Under the Virginia decisions, upon such repossession it ceased to be subject to the provisions of the Traders' Act.

Ten days prior to the filing of the bankruptcy petition said property ceased to be any part of the apparent assets of the then trader and subsequent bankrupt.

Under the authority of Bailey vs. Baker Ice Machine Company, *supra*, the trustee in bankruptcy's status as a lienor became fixed ten days after the Virginia Traders' Act ceased to be applicable to the property of the petitioner.

It therefore follows that the rights of your petitioner were fixed on the 10th day of January, 1922, when it repossessed its property, and that the rights of the trustee in bankruptcy were fixed on the 20th day of January, 1922, when the petition was filed.

We respectfully submit that the ruling of this Honorable Court in Bailey *vs.* Ice Machine Company, *supra*, is conclusive of the legal propositions here involved, and that the Circuit Court of Appeals for the Fourth Circuit, having failed to follow said ruling, that its decision and judgment is erroneous and if permitted to stand would work great injustice to your petitioner and all persons similarly situated.

It is most respectfully submitted that under a proper construction of the Virginia Traders' Act said act could have no application to the property repossessed by your petitioner ten days prior to the filing of the bankruptcy petition, and that the rights of the trustee in bankruptcy as a lienor, being fixed as of the time of the filing of the bankruptcy petition, that he had no claim upon or lien against said property, and that the Circuit Court of Appeals for the Fourth Circuit erred in so holding.

The rights of the trustee in bankruptcy being fixed by the provisions of 47 A of the Bankruptcy Act, as construed by this Honorable Court in Bailey *vs.* Baker, etc., *supra*, that the said Circuit Court of Appeals for the Fourth Circuit were bound by such ruling and when applied to the facts of this case should have held that the property which is the subject of this litigation was not subject to any claim by the trustee.

That the repossession by your petitioner of its property ten days prior to the filing of the bankruptcy petition did not constitute a voidable preference as against the trustee in bankruptcy within the meaning of Section 60-B of the Bankrupt Act is clear under the authority of Bailey *vs.* Baker, etc., *supra*, in which this Court said:

> "The question next to be considered is whether the contract operated as a preferential transfer by Grant Brothers within the meaning of Section *60b* of the Bankruptcy Act, as amended June 25, 1910, Chap. 412; 36 Stat. at L., 838, 842; Comp. Stat., 1913, Sections 9586, 9644, which declares that 'a transfer' by a bankrupt 'of any of his property' shall be voidable by the trustee, if it be made or recorded (when recording is required) within four months before the petition in bankruptcy is filed, and 'the bankrupt be insolvent and the * * * transfer then operate as a preference,' etc. The section leaves no doubt that to be within its terms the transfer must be one which a bankrupt makes of his own property and which operates to prefer one creditor over others; and if further light be needed there is a declaration in the Bankruptcy Act (Section 1, clause 25) that the word 'Transfer' shall be taken to include every mode 'of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security' (30 Stat. at L., 545; Chap. 541, Comp. Stat., 1913, Section 9585). It, therefore, is plain that Section *60b* refers to an act on the part of a bankrupt

whereby he surrenders or encumbers his property or some part of it for the benefit of a particular creditor, and thereby diminishes the estate which the Bankruptcy Act seeks to apply for the benefit of all creditors. New York County Nat. Bank *vs.* Massey, 192 U. S., 138, 147; 48 L. Ed., 380, 384, 24 Sup. Ct. Rept., 199. Applying this test to the contract in question, we think it did not operate as a preferential transfer by Grant Brothers, the bankrupts. The property to which it related was not theirs, but the Baker Company's. The ownership was not transferred, but only the possession, and it was transferred to the bankrupts, not from them. Being only conditional purchasers, they were not to become the owners until the condition was performed. No doubt the right to perform it and thereby to acquire the ownership was a property right. But this right was not surrendered or encumbered. On the contrary, it remained with the bankrupts and ultimately passed to the trustee, who was free to exercise it for the benefit of the creditors. So, there was no diminution of the bankrupts' estate.

"Under the recording law of Kansas a contract of conditional sale is valid between the parties, whether filed for record or not, but is void as against a creditor of the vendee who fastens a lien upon the property by execution, attachment, or like legal process before the contract is filed for record. Gen. Stat., 1909, Sec. 5237; McVay *vs.* English, 30 Kans., 368, 371; 1 Pac., 795; American Lead Pencil Co. *vs.* Champion, 57 Kans., 352, 357; 46 Pac., 969; Youngberry *vs.* Walsh, 72 Kans., 200, 227; 83

Pac., 972; Geyser M. F. G. Co. *vs.* Murray, 84 Kan., 450, L. R. A.; 114 Pac., 1046; Paul *vs.* Lingenfelter, 69 Kan., 871; 132 Pac., 1179; Geppelt *vs.* Middlewest Stone Co., 90 Kan., 539; 135 Pac., 573; Dixon *vs.* Tyrer, 92 Kan., 137; 139 Pac., 1026; Big Four Implement Co. *vs.* Wright, 47 L. R. A. (N. S.), 1223; 125 C. C. A., 577; 207 Fed., 535. Here the contract was made October 14th, 1911, and filed for record May 15, 1912. In the meantime no creditor fastened a lien upon the property by execution, attachment, or other legal process. But it is contended that Section 47 A, clause 2, of the Bankruptcy Act, as amended in 1910, chap. 412, 36 St. at L., 838; 8U Comp. Stat., 1913, sections 9586, 9631, gave the trustee the status of a creditor having such a lien. That section provides that a trustee in bankruptcy, 'as to all property in the custody or coming into the custody of the bankrupt court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings.' Although otherwise explicit, this provision does not designate the time as of which the trustee is to be regarded as having acquired the status indicated, and yet some point of time must be intended. Is it the date of the trustee's appointment, the filing of the petition in bankruptcy, or some time anterior to both? When not otherwise specially provided, the rights, remedies, and powers of the trustee are determined with reference to the conditions existing when the petition is filed. It is then that the bankruptcy proceeding is initiated, that the hands of the bankrupt and of his creditors are stayed, and that his

estate passes actually or potentially into the control of the bankruptcy court. We have said, 'the filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far *in rem* that the estate is regarded as in *custodia legis* from the filing of the petition.' Acme Harvester Co. *vs.* Beeckman Lumber Co., 222 U. S., 300, 307; 56 L. Ed., 208, 213; 32 Sup. Ct. Rep., 96. And again: 'We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed, and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition.' Everett *vs.* Judson, 228 U. S., 474, 479; 57 L. Ed., 927, 929; 46 L. R. A. (N. S.), 154, 33 Sup. Ct. Rep., 568. And see Zavelo *vs.* Reeves, 227 U. S., 625, 631; 57 L. Ed., 676, 678; 33 Sup. Ct. Rep., 365; Ann. Cas., 1914 D, 664. Had it been intended that the trustee should take the status of a creditor holding a lien by legal or equitable process as of a time anterior to the initiation of the bankruptcy proceeding, it seems reasonable to believe that some expression of that intention would have been embodied in Section 47-A, as amended. As this was not done, we think the latter view, and one which accords with other provisions of the act, is that the trustee takes the status of such a creditor as of the time when the petition in bankruptcy is filed. Here the petition was filed almost two months after

the contract was filed for record, and therefore the trustee was not entitled to assail it under the recording law of the State."

Conclusion.

We respectfully submit that had the Circuit Court of Appeals for the Fourth Circuit followed the rule of decision in Virginia in construing the so-called "Traders' Act" and the ruling of this Honorable Court in Bailey *vs.* Baker Ice Machine Co., *supra*, that judgment would have been pronounced in favor of your petitioner.

Your petitioner further respectfully submits that, for the reasons assigned and that because if said decision of said Circuit Court of Appeals for the Fourth Circuit is permitted to stand that there will be a conflict of the construction of Section 47-A of the Bankrupt Act among the several circuits of the United States, a writ of certiorari to review the judgment of the said circuit court of appeals should be granted.

Respectfully submitted,

S. M. BRANDT,
Attorney for Petitioner.